

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.972 OF 2007
IN
SUIT NO.3423 OF 1991

Mrs. Hansa Kantilal & Ors. ... Plaintiffs

Vs.

Pravinkumar Khimji & Ors. ... Defendants

Mr. Ruchir Tolat i/b L.C. Tolat & Co. for the plaintiffs.

Ms. R.C. Nichani for defendant 1.

CORAM : SMT. RANJANA DESAI, J.

DATED : OCTOBER 5, 2007.

P.C.:-

1. This chamber summons has been taken out by defendant 1 praying that delay of about 2 years in filing the written statement of defendant 1 be condoned and the written statement be ordered to be taken on file.

2. I have heard learned counsel appearing for defendant 1. She has drawn my attention to the affidavit in support of the notice of motion wherein it is stated that defendant 1 had appointed M/s. Diwakar & Co. to represent him in all proceedings. However, M/s. Diwakar & Co. did not file his written statement. In the month of October, 1994, defendant 1 received a letter from M/s. Diwakar & Co. asking him to collect all papers from them as they had obtained an order of discharge. Till then, defendant 1 was not aware that the written statement was not filed. According to defendant 1, in the month of November, 1996, he was served with a copy of Notice of Motion No.546 of 1995. From the contents of the affidavit in support thereof, he learnt that his written statement was not filed in the suit. He then contacted his present advocate and gave instructions to file reply to the notice of motion. Affidavit in reply to the said notice of motion and the written statement were duly affirmed and declared by him on 17/12/1996. However, through oversight, the vakalatnama in the suit remained to be signed by him and consequently, the affidavit and the written statement could not be filed in the court. According to defendant 1, thereafter, on

account of his constant ill-health as also the illness of his wife, he could not file the vakalatnama and the written statement along with the affidavit in reply. According to him, on 6/7/1998 the plaintiffs in the suit served upon him Notice of Motion No.1095 of 1997 in Appeal No.241 of 1992. From the copy of the notice of motion, defendant 1 realized that an ex-parte decree was passed in March, 1997. Defendant 1 took out a notice of motion for setting aside the same. Subsequently, when it was realized that defendant 1 had to file an appeal, that motion was withdrawn with liberty to file an appeal. Defendant 1, thereafter, filed an appeal which was allowed by the Division Bench by order dated 20/4/2007 and the ex-parte decree was set aside. It is contended that delay has occurred in the above circumstances and, hence, it may be condoned.

3. Ms. Nichani, learned counsel for defendant 1 reiterated the contents of the affidavit and submitted that the delay is not intentional. She submitted that in the interest of justice, delay may be condoned. Mr. Tolat, learned counsel for the plaintiffs has strenuously opposed the prayer made by defendant 1. He

submitted that the explanation given in the affidavit is totally unacceptable. He submitted that during the relevant time, defendant 1 was prosecuting other litigation and, therefore, his case that he was ill and, therefore, he could not file written statement, is false. He submitted that, therefore, the motion be dismissed.

4. Having perused the explanation offered in the affidavit in support of the notice of motion, I am of the opinion that defendant 1 has made out a case for condonation of delay. However, defendant 1 will have to be saddled with costs. Hence, the following order.

5. Delay in filing the written statement of defendant 1 is condoned on condition that defendant 1 pay costs quantified at Rs.10,000/- to the plaintiffs. Payment of costs will be condition precedent for acceptance of the written statement. Costs be paid within four weeks from today. Defendant 1 shall satisfy the office that payment has been made. Office shall then take the written

statement on file. Chamber summons is disposed of.

[SMT. RANJANA DESAI, J.]